REQUEST UNDER THE FREEDOM OF INFORMATION ACT

June 26, 2014

National Freedom of Information Office
U.S. EPA
FOIA and Privacy Branch
1200 Pennsylvania Avenue, N.W. (2822T)
Washington, DC 20460

BY ELECTRONIC MAIL: hq.foia@epa.gov

Re: Request for Certain Agency Records — EPA notifications to National Archivist of possible loss of Gina McCarthy, Phillip North records

To EPA Freedom of Information Officer,

On behalf of the Competitive Enterprise Institute (CEI), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*. CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as an active transparency initiative seeking public records relating to how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us within twenty working days copies of **all notices from EPA to the National Archivist of a possible loss or removal of records of EPA employee Gina McCarthy,** either as Assistant Administrator for Air and Radiation or as Administrator.[1]

By this same request we also seek EPA's notice(s) to NARA of possible loss of records referred to in Gina McCarthy's June 25, 2014, testimony to the House Committee on Oversight and Government Reform, involving former Agency employee Phillip North.

EPA practice indicates that EPA's Agency Records Officer is the most likely to have created and possess responsive records.

This request derives from Ms. McCarthy's assertion that the EPA at some point discovered, and reported to NARA, that there may be unrecoverable emails of former Agency employee North.[2]

Critically, this affirms that EPA does in fact understand the statutory process and obligation to notify NARA toward initiating a series of remedial steps in such instances. Although the Bush EPA so notified NARA when it discovered the deletion of emails,[3] EPA refuses to do so regarding the wholesale destruction of Ms. McCarthy's text messages — which EPA has affirmed to us with documentary evidence numbered in the

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[1] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion, *infra*.

[2] Erica Martinson, "EPA joins lost emails club," *Politico*, June 25, 2014, http://www.politico.com/story/2014/06/missing-government-emails-epa-108306.html.

[3] See e.g., April 11, 2008 memorandum from John B. Ellis, EPA Agency Records Officer, to Paul Wester, Director, Modern Records Program, National Archives and Records Administration (reporting discovery that former Administrator Carol Browner's secondary email account had been set on "auto delete" apparently at its outset); http://www.epw.senate.gov/public/_files/2008_EPA_Archives_Memo_HILITED.pdf.

thousands — despite CEI's carious attempts to compel EPA to "follow the law," as recently described by the National Archivist. In fact, in response to one lawsuit EPA forced CEI to file, through the Department of Justice it called the request that EPA follow the law as an "intrusive" attempt to require EPA do so and that n one can make it do so (see Defendant's Motion to Dismiss, *CEI v. EPA*, 1/3/14 (13-01532)(D.D.C.).

Subsequent revelations about the IRS and EPA have placed this defiance in stark relief for the public and Congress. Now that the current EPA has informed Congress that it knows its obligation and how to execute it, we seek copies of the required notice(s) regarding the wholesale destruction/loss of Ms. McCarthy's text correspondence, and Mr. North's emails.

The knowledge on the part of the agency head of this loss triggers the obligation under the Federal Records Act, 44 U.S.C.A. § 3106, to notify the Archivist of the United States and the Attorney General, and initiate recovery of those records it believes may have been lost. As DoJ affirms that it was Ms. McCarthy who destroyed her text correspondence, the Agency head inarguably possesses this knowledge.

The federal government's practice is that it is the discovery of "possible unauthorized destruction of computer files," that is, by other than than the prescribed retention/removal policies and procedures, that triggers the notification. As EPA previously showed, evidenced by its proclaimed "North" notice to NARA and the above-cited "Wester memo", there is no requirement that *e.g.*, the unlawfulness of the removal or destruction must first be proved.

There is no information publicly available that EPA notified the Archivist or the Attorney General regarding the asserted loss, whenever EPA learned of it. To the contrary, EPA's defiance that no one can make it comply with the law and continued refusal to provide evidence that it has informs the public that it has not. We seek to determine what if anything EPA has informed NARA pursuant to this obligation, which in turn will help inform the public of EPA's consistency in following the law.

This is important on its own merits as well as due to other instances we have encountered of federal agencies learning of possible destruction or removal of records and refusing to notify NARA or the Attorney General, and initiate steps to recreate the lost records, as required (see e.g., *Competitive Enterprise Institute v. EPA*, 14-cv-00582, *CEI v. EPA*, No. 13-1074, *CEI v. EPA*, No. 13-779; see also EPA FOIA request no. HQ-2014-00643 (May 13, 2014)).

We agree to pay up to $100.00 for responsive records in the event EPA denies our fee waiver request detailed, *infra*.

EPA Must Err on the Side of Disclosure

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested

documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the recent Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, "a democracy requires accountability, and accountability requires transparency," and "the Freedom of Information Act… is the most prominent expression of a profound national commitment to ensuring open Government." Accordingly, the President has directed that FOIA "be administered with a clear presumption: In the face of doubt, openness prevails" and that a "presumption of disclosure should be applied to all decisions involving FOIA."

Request for Fee Waiver

It should go without elaboration that the issue at the core of this request is of intense public interest. Regardless, we note the aforementioned national media coverage of Ms. McCarthy's acknowledgement on June 25, 2014, and June 13-14, 2014, for example.[4]

Nonetheless, this discussion is detailed as a result of our recent experience of EPA improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records to groups whose requests are, apparently, unwelcome, including and particularly CEI. This is also despite our history of regularly obtaining fee waivers.

Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest.

CEI's principal request for waiver or reduction of all costs is pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge... if disclosure of

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[4] Rachel Blade, "IRS, Republicans clash over Lois Lerner emails," *Politico*, June 13, 2014, http://www.politico.com/story/2014/06/irs-lois-lerner-email-107850.html#ixzz34er1dC4H. See also, "The IRS…can't find two years of emails from Lois Lerner to the Departments of Justice or Treasury. And none to the White House or Democrats on Capitol Hill. An agency spokesman blames a computer crash." Editorial, "The IRS Loses Lerner's Emails", *Wall Street Journal*, June 13, 2014, http://online.wsj.com/articles/the-irs-loses-lerners-emails-1402700540, John D. McKinnon, "IRS Says Official's Emails Were Lost in Computer Crash," *Wall Street Journal*, June 13, 2014, http://online.wsj.com/articles/irs-provides-more-emails-in-conservative-group-targeting-probe-1402684543.

the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester").

CEI does not seek these records for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as 501(c)3 educational organization. As such, requester also has no commercial interest possible in these records. If no commercial interest exists, an assessment of that non-existent interest is not required in any balancing test with the public's interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010).

The public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987). The Requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. "The legislative history of the fee waiver provision reveals that it was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,' in particular those from

journalists, scholars and nonprofit public interest groups." *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); S. COMM. ON THE JUDICIARY, AMENDING the FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[5]

"This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by… agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987) (quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requester's ability -- as well as many nonprofit organizations, educational institutions and news media that will benefit from disclosure -- to utilize FOIA depends on their ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically

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[5] This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that "rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Better Gov't v. State*. They therefore, like Requester, "routinely make FOIA requests that potentially would not be made absent a fee waiver provision", requiring the court to consider the "Congressional determination that such constraints should not impede the access to information for appellants such as these." *Id*.

under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers. This waiver provision was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as '"toll gates" on the public access road to information.'" *Better Gov't Ass'n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions."

Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI.*

Therefore, "insofar as… [agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups

Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better Gov't v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that "'chill' the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage." *Id*. As such, agency implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for Requester.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified.

1) **The subject matter of the requested records specifically concerns identifiable operations or activities of the government**. Potentially responsive records reflect the Agency's compliance with federal record-keeping and related notification laws that are now the focus of a national interest.

The requested records pertains to the apparent loss of records sought by congressional oversight bodies as well as other lost records which have been the subject of longstanding CEI inquiry and attendant media coverage of same. More specifically, given the intrigue surrounding when EPA learned of this apparent loss, and congressional demands that EPA recreate the now-incomplete record, the requested record(s) will inform the public about EPA's efforts to inform NARA (in one instance: North), or whether it never bothered to notify NARA of this newsworthy discovery, at all, in the other (McCarthy).

Our request seeks to answer the question of what did EPA know about this and when, and what has been done about it. Disseminating information about this matter, as we intend to broadly do, is inherently in the public interest.

Release of these records also directly relates to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration in history."[6] This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the Administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (*see*, *e.g.*, an internet search of "study Obama transparency").

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[6] Jonathan Easley, *Obama says his is* '*most transparent administration*' *ever*, THE HILL, Feb. 14, 2013, http://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history.

Particularly after undersigned counsel's recent discoveries using FOIA, related publicizing of certain agency record-management and electronic communication practices and related other efforts to disseminate the information, the public, media, and Congressional oversight bodies have expressed great interest in how widespread are the violations of this pledge of unprecedented transparency and, particularly, in the issue central to the present request (record retention or destruction).

This request, when satisfied, will further inform this ongoing public discussion.

Further, CEI is actively analyzing agency record creation and preservation practices, specifically (as noted, *supra*), agency adherence to FRA's notice and remedy requirement in instances where records have been destroyed. On its face, therefore, information shedding light on this relationship satisfies FOIA's test.

For the aforementioned reasons, potentially responsive records unquestionably reflect "identifiable operations or activities of the government" with a connection that is direct and clear, not remote.

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

2) **Requester intends to broadly disseminate responsive information**. As demonstrated herein including in the litany of exemplars of newsworthy FOIA activity requester has generated with public information and requester has both the intent and the ability to convey any information obtained through this request to the public.

CEI and requesting counsel, particularly for his FOIA work, regularly publish works and are regularly cited in newspapers and trade and political publications, representing a practice of broadly disseminating public information obtained under FOIA, which practice requester intends to continue in the instant matter.[7]

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[7] Examples include *e.g.*, Stephen Dinan, "Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle," WASHINGTON TIMES, Apr. 30, 2011, at A1; Peter Foster, "More Good News for Keystone," NATIONAL POST, Jan. 9, 2013, at 11; Juliet Eilperin, "EPA IG Audits Jackson's Private E-mail Account," WASHINGTON POST, Dec. 19, 2013, at A6; James Gill, "From the Same Town, But Universes Apart," NEW ORLEANS TIMES-PICAYUNE, Jan. 2, 2013, at B1; Kyle Smith, "Hide & Sneak," THE NEW YORK POST, Jan. 6, 2013, at 23. *See also*, Stephen Dinan, "EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy," WASHINGTON TIMES, Apr. 9, 2013, at A4; Stephen Dinan, "Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages," WASHINGTON TIMES, Apr. 2, 2013, at A1, Stephen Dinan, "Researcher: NASA hiding climate data", WASHINGTON TIMES, Dec. 3, 2009, at A1, Dawn Reeves, "EPA Emails Reveal Push To End State Air Group's Contract Over Conflict," INSIDE EPA, Aug. 14, 2013. *See also* Stephen Dinan, "EPA's use of secret email addresses was widespread: report," WASHINGTON TIMES, Feb. 13, 2014; *see also*, *See also* Christopher C. Horner, EPA administrators invent excuses to avoid transparency, WASHINGTON EXAMINER, Nov. 25, 2012; Christopher C. Horner, EPA Circles Wagons in'Richard Windsor' Email Scandal, BREITBART, Jan. 16, 2013; Horner: *The FOIA coping response in climate scientists*, WATTS UP WITH THAT, Jan. 21, 2014; *Nothing to See Here! Shredding Parties and Hiding the Decline in Taxpayer-Funded Science*, WATTS UP WITH THAT, Feb. 17, 2014 (see also generally http://wattsupwiththat.com/?s=horner); *The Collusion of the Climate Crowd*, WASHINGTON EXAMINER, Jul. 6, 2012; *Yes, Virginia, you do have to produce those 'Global Warming" documents* (with David W. Schnare and Del. Robert Marshall), WASHINGTON EXAMINER, Jan. 5, 2011; *Obama Admin Hides Official IPCC Correspondence from FOIA Using Former Romney Adviser John Holdren*, BREITBART, Oct. 17, 2013; *Most Secretive Ever? Seeing Through 'Transparent' Obama's Tricks,* WASHINGTON EXAMINER, Nov. 3, 2011; *NOAA releases tranche of FOIA documents -- 2 years later*, WATTS UP WITH THAT (two-time "science blog of the year"), Aug. 21, 2012; *The roadmap less traveled,* WATTS UP WITH THAT, Dec. 18, 2012; *EPA Doc Dump: Heavily redacted emails of former chief released*, BREITBART, Feb. 22, 2013; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, *DOJ to release secret emails*, BREITBART, Jan. 16, 2013; *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012; *Chris Horner responds to the EPA statement today on the question of them running a black-ops program*, WATTS UP WITH THAT, Nov. 20, 2012; *FOIA and the coming US Carbon Tax via the US Treasury*, WATTS UP WITH THAT, Mar. 22, 2013; *Today is D-Day -- Delivery Day -- for Richard Windsor Emails*, WATTS UP WITH THAT, Jan. 14, 2013; *EPA Doubles Down on 'Richard Windsor' Stonewall*, WATTS UP WITH THAT, Jan. 15, 2013; *Treasury evasions on carbon tax email mock Obama's 'most transparent administration ever' claim*, WASHINGTON EXAMINER, Oct. 25, 2013.

3) **Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.** Requester intends to broadly disseminate responsive information. The requested records have an informative value and are "likely to contribute to an understanding of Federal government operations or activities," just as did requester's (and others') similar FOIA requests, this issue is of significant and increasing public interest. This is not subject to reasonable dispute.

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain**. It cannot be denied that, to the extent the requested information is available to any parties, this is information held only by EPA or NARA It is therefore clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

Further, given the tremendous media interest generated to date in revelations about EPA's and IRS's record creation and maintenance practices, as well as Ms. McCarthy's activities on behalf of EPA, the notion that disclosure will not significantly inform the public at large about operations or activities of government is facially absurd.[8]

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[8] *See, e.g.*, FN ## 2, 4, 7, *supra*.

Thus, disclosure and dissemination of this information will facilitate meaningful public participation in the policy debate, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency's dealings with interested parties outside the agency and interested -- but not formally involved -- employees who may nonetheless be having an impact on the federal permitting process, state and local processes and/or activism on the issue.

4) **The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons.** Requester has an established practice of utilizing FOIA to educate the public, lawmakers, and news media about the government's operations and, in particular and as illustrated in detail above, have brought to light important information about policies grounded in energy and environmental policy.

CEI is dedicated to and has a documented record of promoting the public interest, advocating sensible policies to protect human health and the environment, broadly disseminating public information, and routinely receiving fee waivers under FOIA.

With a demonstrated interest and fast-growing reputation for and record in the relevant policy debates and expertise in the subject of energy- and environment-related regulatory policies, CEI unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

5) **The disclosure will contribute "significantly" to public understanding of government operations or activities**. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is "likely to contribute" to an understanding of specific government operations or activities*.

As previously explained, the public has no source of information on this issue of what EPA knew about the loss of Ms. McCarthy's texts — and now Mr. North's emails — and what if anything it did in response to learning this, given the Federal Records Act, NARA's record-keeping schedules and federal email preservation practices.

Because there is no such information or any such analysis in existence, any increase in public understanding of this issue is a significant contribution to this increasingly important issue as regards the operation and function of government.

Because CEI has no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

Other Considerations

EPA must consider four conditions to determine whether a request is in the public interest and uses four factors in making that determination. We have addressed factors all factors, but add the following additional considerations relevant to factors 2 and 4.

Factor 2

FOIA requires the Requester to show that the disclosure is likely to contribute to an understanding of government operations or activities. Under this factor, agencies assess the "informative value" of the records and demands "an increase" in

understanding. This factor 2 has a fatal logical defect. Agencies offer no authority for requiring an "increase" in understanding, nor does it provide a metric by which to measure an increase. And, agencies offer no criteria by which to determine under what conditions information that is in the records and is already somewhere in the public domain would be likely to contribute to public understanding.

Agencies typically argue that they evaluate Factor 2 (and all others) on a case by case basis. In doing so, it "must pour 'some definitional content' into a vague statutory term by 'defining the criteria it is applying.'" *PDK Labs. v. United States DEA*, 438 F.3d 1184, 1194, (D.C. Cir. 2006)(citations omitted). "To refuse to define the criteria it is applying is equivalent to simply saying no without explanation." *Id*. "A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush." *Paralyzed Veterans of Am. V. D.C. Arena LP*, 117 F.3d 579, 584 (D.C. Cir. 1997). Agency failure to pour any definitional content into the term "increase" does not even rise to the level of mush.

Despite the lack of any metric on what would constitute a sufficient increase in public understanding, the Requester meets the requirement because for the information we seek there is no public information. The information we seek will be used to increase the public' understanding of two questions: when did EPA learn of this destruction of which it just notified Congress, and has it acted on its obligation to notify the National Archivist/Attorney General. There is no public information available on either of these issues. Any information on that would increase the public's knowledge.

In addition, as noted CEI is researching and developing the record on agency record-management practices including this issue of notifying/not notifying NARA and/or the Attorney General when records are discovered to have been lost/destroyed. A quick review of the media and other public interest generated by Ms. McCarthy's actions on behalf of the EPA, and on our work regarding the discovery that federal officials' text messages are being destroyed, apparently wholesale, should be sufficient to understand the importance of this research and its value to increasing public understanding of the operations and activities of the government.

Given the policy implications and public and Congressional interest to date, agency information on these issues is plainly of public interest.

The public has no other means to secure information on these government operations other than through the Freedom of Information Act. Absent access to the public record, the public cannot learn about these governmental activities and operations.

Factor 4

Agencies requires the Requester to show how the disclosure is likely to contribute significantly to public understanding of government operations or activities.

Once again, we note that agencies have not provided any definitional content into the vague statutory term "significantly," offering no criteria or metric by which to measure the significance of the contribution to public understanding CEI will provide. Nevertheless, as previously explained, the public has no source of information on the issue. Any increase in public understanding of this issue is a significant contribution to this highly visible and politically important issue as regards the operation and function of government, especially at a time when agency transparency is (rightly) so controversial.

As such, requester has stated "with reasonable specificity that their request pertains to operations of the government," that they intend to broadly disseminate responsive records. "[T]he informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

We note that federal agencies regularly waive requester CEI's fees for substantial productions arising from requests expressing the same intention, even using the same language as used in the instant request.[9] This request is unlikely to yield substantial document production.

For all of these reasons, CEI's fees should be waived in the instant matter.

Alternately, CEI qualifies as a media organization for purposes of fee waiver

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[9] *See, e.g.*, no fees required by other agencies for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language include: **DoI** OS-2012-00113, OS-2012-00124, OS-2012-00172, FWS-2012-00380, BLM-2014-00004, BLM-2012-016, BLM: EFTS 2012-00264, CASO 2012-00278, NVSO 2012-00277; **NOAA** 2013-001089, 2013-000297, 2013-000298, 2010-0199, and "Peterson-Stocker letter" FOIA (August 6, 2012 request, no tracking number assigned, records produced); **DoL** (689053, 689056, 691856 (all from 2012)); **FERC** 14-10; **DoE** HQ-2010-01442-F, 2010-00825-F, HQ-2011-01846, HQ-2012-00351-F, HQ-2014-00161-F, HQ-2010-0096-F, GO-09-060, GO-12-185, HQ-2012-00707-F; **NSF** (10-141); **OSTP** 12-21, 12-43, 12-45, 14-02.; **EPA** HQ-2013-000606, HQ-FOI-01087-12, HQ-2013-001343, R6-2013-00361, R6-2013-00362, R6-2013-00363, HQ-FOI-01312-10, R9-2013-007631, HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12, HQ-2014-006434. These latter examples involve EPA either waiving fees, not addressing the fee issue, or denying fee waiver but dropping that posture when requester sued.

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event EPA refuses to waive our fees under the "significant public interest" test, which we would then appeal while requesting EPA proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media…").

However, we note that as documents are requested and available electronically, there are no copying costs.

Requester repeats by reference the discussion as to its publishing practices, reach and intentions to broadly disseminate, all in fulfillment of CEI's mission, set forth *supra*.

Also, the federal government has already acknowledged that CEI qualifies as a media organization under FOIA.[10]

The key to "media" fee waiver is whether a group publishes, as CEI most surely does. *See supra*. In *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the D.C. Circuit wrote:

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[10] *See e.g.*, Treasury FOIA Nos. 2012-08-053, 2012-08-054.

> The relevant legislative history is simple to state: because one of the purposes of FIRA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: "It is critical that the phrase `representative of the news media' be broadly interpreted if the act is to work as expected.... If fact, *any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a `representative of the news media.'"*

Id. at 1385-86 (emphasis in original).

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact is determinative, the "*plan to act, in essence, as a publisher*, both in print and other media." *EPIC v. DOD,* 241 F.Supp.2d at 10 (*emphases* added). "In short, the court of appeals in National Security Archive held that '[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.'" *Id*. at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

For these reasons, CEI plainly qualifies as a "representative of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public.

The information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned

with EPA activities in this controversial area, or as the Supreme Court once noted, what their government is up to.

For these reasons, requester qualifies as a "representative[] of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, particularly after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format, so there should be no costs.

Conclusion

We expect EPA to release within the statutory period all responsive records and any segregable portions of responsive records containing properly exempt information, to disclose records possibly subject to exemptions to the maximum extent permitted by

FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009)("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears).

We expect all aspects of this request including the search for responsive records be processed free from conflict of interest. We request EPA provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). EPA must at least inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires EPA to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal*

Election Commission, 711 F.3d 180, 186 (D.C. Cir. 2013). See also, *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, *e.g.*, *CREW v. FEC*.

If you have any questions please do not hesitate to contact me. I look forward to your timely response.

Sincerely,

Christopher C. Horner
Senior Fellow
Competitive Enterprise Institute
1899 L Street, NW, 12th Floor
Washington, D.C. 20036
202.262.4458 (M)
chorner@cei.org